No. 153

In the Supreme Court of the United States

OCTOBER TERM, 1954

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

DREXEL & COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COUPT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

WILLIAM H. TIMBERS,
General Counsel,
MYRON S. ISAACS,
Associate General Counsel,
ELIZABETH B. A. ROGERS,
Attorney,
Securities and Exchange Commission,
Washington 25, D. C.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 288-289) is not reported. The opinion of the Court of Appeals (R. 305-312) is reported in 210 F. 2d 585.

JURISDICTION

The judgment of the Court of Appeals was entered February 25, 1954 (R. 313). The time for filing a petition for a writ of certiorari was ex-

tended to June 21, 1954 (R. 319). The petition for a writ of certiorari was filed on June 21, 1954, and granted on October 14, 1954 (R. 341). The jurisdiction of this Court rests on 28 U.S.C. 1254. See also Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U.S.C. 79y.

QUESTION PRESENTED

Whether, under the Public Utility Holding Company Act of 1935, the Securities and Exchange Commission's jurisdiction over fees payable by registered holding companies covers a fee claimed for services for the benefit of a registered holding company parent incident to the reorganization of its subsidiary and to related transactions by the parent, when the fee is to be paid by the parent and not out of the assets of the subsidiary in reorganization.

STATUTE INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U.S.C. 79a *et seq.*) are set forth in the Appendix, *infra*, pp. 39-45.

STATEMENT

This case presents the question whether the Securities and Exchange Commission has statutory jurisdiction pursuant to the Public Utility Holding Company Act of 1935 to pass upon a fee payable by Electric Bond and Share Company ("Bond and Share"), a registered holding company, for services rendered for its benefit in consolidated proceedings which dealt both with the re-

organization of a Bond and Share subsidiary, Electric Power & Light Corporation ("Electric"), and with related transactions by Bond and Share itself.

The initial proceeding which ultimately led to the reorganization of Electric was one instituted by the Commission in 1940, pursuant to Section 11(b)(2) of the Act. Bond and Share, Electric, and various other subsidiaries of Bond and Share were named as respondents. In its order, the Commission directed that hearings be held to determine, *inter alia*, what action, if any, was necessary and should be required to be taken by the respondents, or any of them, "to ensure that the corporate structure or continued existence of any of the respondents herein does not unduly or unnecessariiy complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the holding company system of Electric Bond and Share Company." *Electric Bond and Share Company,* Holding Company Act Release No. 2051, at p. 16.

At that time, Electric was one of five sub-holding companies in the Bond and Share holding company system (R. 218). Bond and Share held approximately 57% of the common stock and approximately 47% of the voting power of Electric (R. 7). Electric itself controlled electric and gas utility subsidiaries operating in the States of Arkansas, Colorado, Idaho, Louisiana, Mississippi, Nevada, Oregon, Utah, and Wyoming, and in the Republic of Mexico (R. 218).

In 1941 the Commission entered an order in that proceeding requiring National Power & Light Company, a sister company of Electric, to dissolve upon the ground that "the corporate structure and continued existence of National unduly and unnecessarily complicate the structure and unfairly and inequitably distribute voting power among the security holders of the holding company system of Bond and Share." *Electric Bond and Share Company*, 9 S.E.C. 978, 1009-1010. Bond and Share as well as National was directed to proceed with due diligence to comply with the dissolution order, "including the submission to us of a plan or plans looking to the final dissolution of National and such further declarations or applications as may be required." *Electric Bond and Share Company, supra*, at 1011.[1]

By order dated August 22, 1942, in the same proceeding, the Commission directed that Electric and another sister company, American Power & Light Company, be dissolved for the same reason. Again, Bond and Share as well as Electric and American

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[1] Through a series of transactions, National Power & Light Company ceased to be a holding company and was eliminated, together with its subsidiaries, from the Bond and Share system. See *Electric Bond and Share Company*, 12 S.E.C. 392 (1942); 20 S.E.C. 615 (1945); 21 S.E.C. 143 (1945); 22 S.E.C. 866 (1946); Holding Company Act Releases No. 8445 (1948), 8467 (1948), 8942 (1949), and 10640 (1951). Bond and Share was a party to most of the proceedings and the fees and expenses incurred by it, and payable out of its assets, were passed upon by the Commission. *National Power & Light Company*, Holding Company Act Release No. 7172 (January 31, 1947).

Power & Light Company were directed to proceed with due diligence to submit to the Commission a plan or plans for the effectuation of the order. *Electric Bond and Share Company*, 11 S.E.C. 1146, 1223; Holding Company Act Release No. 3750. The order was affirmed on appeal. *American Power & Light Co.* v. *S.E.C.*, 141 F. 2d 606 (C.A. 1), affirmed, 329 U.S. 90.[2]

By a series of steps subsequent to the dissolution order, Electric reorganized its subsidiary companies so as to bring them toward conformity with Section 11(b) of the Act, and disposed of certain of its subsidiaries which would be clearly non-retainable under the integration standards set out in Section 11(b)(1) (R. 218). Among the more important steps taken was the reorganization of United Gas Corporation ("United"), a major subsidiary of Electric, pursuant to a plan filed by Bond and Share, Electric, and United. In November, 1944, pursuant to that plan, Electric acquired new United securities, and Bond and Share received

[2] As in the case of National Power & Light Company, footnote 1, *supra*, American Power & Light Company has complied with the Commission's order that it dissolve. See *American Power & Light Company*, 21 S.E.C. 191, 309 457 (1945); Holding Company Act Releases No. 9359-A (1949), 9389 (1949), 9948 (1950), 10,820 (1951), 11,301 (1952) and 11,797 (1953). Again Bond and Share was a party to the more important aspects of the proceedings and the fees and expenses incurred in connection therewith, payable out of Bond and Share's assets, were passed upon by the Commission. *American Power & Light Company*, Holding Company Act Releases No. 4926 and 4962 (1944), 16 S.E.C. 531 (1944), approved,

No. 11,517 (October 1, 1952) and 11,904 (May 11, 1953).

$44,000,000 in cash, in exchange for their former holdings of United securities.[3]

In July, 1945, pursuant to Section 11(e), Bond and Share filed a series of plans for its own reorganization. The first proposal was a partial retirement of the Bond and Share preferred stock through a cash payment to be made in large part out of the proceeds of the United reorganization —a plan which was ultimately approved and enforced. The plans also made provision for the settlement of claims against Bond and Share and its wholly owned subsidiaries asserted by and on behalf of Electric, its sister companies, and their subsidiaries.[4]

In November, 1945, Electric filed a plan pursuant to Section 11(e) as a first step in its dissolution, proposing a voluntary exchange of an unspecified number of shares of the common stock of United for each share of Electric's $7 and $6 preferred stock, the exact number of shares to be fixed by subsequent amendment. Electric filed the amendment setting forth the proposed ratios of exchange on May 3, 1946. (R. 218.)

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[3] *United Gas Corporation*, Holding Company Act Releases No. 4926 and 4962 (1944), 16 SEC. 531 (1944), approved, *In re United Gas Corporation*, 58 F. Supp. 501 (D. Del.), affirmed 162 F. 2d 409 (C.A. 3).

The fees and expenses of Bond and Share and of Electric incurred in this proceeding, which were paid out of their respective assets, were passed upon by the Commission. *United Gas Corporation*, Holding Company Act Releases No. 5677 [redacted] 162 F. 2d 409 (C.A. 3).

[4] *Electric Bond and Share Company*, 20 SEC. 786, 787, enforced, S.D. N.Y., Civil Action 33-343, November 5, 1945.

Six days later, Bond and Share filed a plan of its own, pursuant to Section 11(e), for the dissolution of Electric. Bond and Share's plan also provided for the settlement of all claims asserted or which might be asserted on behalf of Electric and its past and present subsidiaries against Bond and Share and its wholly-owned subsidiaries. (R. 321-324.)[5]

On July 1, 1946, Electric and Bond and Share jointly filed a Section 11(e) plan in substitution for the plans theretofore filed. This joint plan followed generally the terms of Bond and Share's plan for Electric's dissolution, but prescribed somewhat different treatment of Electric's preferred shareholders, and provided for the payment by Bond and Share of $2,200,000 in settlement of the claims against Bond and Share and its wholly-owned subsidiaries. (R. 324-330.)

After public hearings, briefs, and oral arguments, this plan was submitted to the Commission for consideration, but subsequent changes in market conditions made it clear that the joint plan was not feasible (R. 218-219).

Thereafter, Electric filed the substitute plan dated March 24, 1948, which (with minor amendments) has since been consummated (R. 219). That plan generally provided for the creation of a new holding company, Middle South Utilities, Inc. ("Middle South"), to which Electric was to trans-

[5] The settlement proposal had originally constituted a part of the plans filed by Bond and Share for its own reorganization in July 1945. (See p. 6, *supra*).

fer its holdings of the common stocks of its electric utility subsidiaries and certain residual assets; the retirement of the $6 and $7 preferred stocks and the second preferred stock of Electric through the distribution to those security holders of shares of Middle South and of United; and distribution of the remaining shares of Middle South and United, to the holders of the common stock and option warrants for the purchase of the common stock of Electric. It also provided for the payment of $2,200,000 by Bond and Share to Electric in settlement of the intrasystem claims. (R. 4-28, 219-220.)

One week later, Bond and Share filed an application-declaration pursuant to Sections 10, 11, and 12 of the Act (R. 330-339), requesting the necessary Commission approval of its "sale" of its holdings of Electric stock, its "acquisition" of shares of the stocks of United and Middle South, and its payment of $2,200,000 in settlement of the intrasystem claims.[6] These transactions, and Commission approval thereof, were required in order to permit consummation of the plan. The plan and Bond and Share's amended application-declaration

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[6] Section 2(a)(22) of the Act defines "acquisition" to include "any purchase, acquisition by lease, exchange, merger, consolidation, or other acquisition." Section 2(a)(23) of the Act defines "sale" to include "any sale, disposition by lease, exchange or pledge, or other disposition." In *Electric Bond and Share Company*, Holding Company Act Release No. 11,004 (February 6, 1952), petition for review withdrawn, the Commission held that Sections 9(a) and 10 of the Act were applicable to Bond and Share's acquisition of securities in connection with the reorganization of Electric.

were considered together by the Commission in consolidated proceedings and were approved by order dated March 7, 1949 (R. 36-41), subject to a specific reservation of jurisdiction "to determine the reasonableness and appropriate allocation of all fees and expenses and other remuneration incurred or to be incurred in connection with the said Plan, as amended, and the transactions incident thereto," other than certain fees separately approved as part of the plan (R. 38).

The plan was enforced by order of the United States District Court for the Southern District of New York (R. 41-47), which was affirmed on appeal. *In re Electric Power & Light Corp.*, 176 F. 2d 687 (C.A. 2), stay denied, 337 U.S. 903. As approved and consummated, the plan was substantially the same as filed by Electric in March, 1948.[7]

Drexel & Co. ("Drexel") was retained by Bond and Share in May 1945 (R. 120). No fee was agreed upon, both Drexel and Bond and Share understanding that the amount to be paid would be "such amount as might be approved by the Commission" (R. 193). The firm made studies relating to the potential earnings of Electric, possible types of plans for its dissolution, and the nature of the evidence to be adduced thereon. The bulk of the Drexel work was performed prior to September 20, 1946, by Edward Hopkinson, Jr., the

[7] Minor changes were required by the Commission's Findings and Opinion dated March 1, 1949, Holding Company Act Release No. 8889, and were embodied in an amendment to the plan filed March 3, 1949 (R. 34-35).

senior partner of the firm, and related directly to the plans theretofore filed by Electric and Bond and Share and subsequently withdrawn. Hopkinson was consulted by Bond and Share in 1947 and 1948, and participated actively in negotiations during February and March 1948, but took no active part thereafter. (R. 153-154, 262-264.)

On April 4 and 5, 1950, hearings were held before the Commission pursuant to the reserved jurisdiction to pass upon fees and expenses. Bond and Share filed a "Petition * * * for Approval of Payment of Fees and Expenses," requesting that the Commission approve aggregate payments of approximately $265,000 (later increased to $310,000 (R. 216)), including $100,000 to Drexel (R. 54-55),[8] and a petition for reimbursement by Electric (R. 251).

Drexel filed a "Petition * * * for Approval of Fee for Services on Behalf of Electric Bond and Share Company," together with a supporting statement (R. 59-117). The petition was introduced by the statement:

> Drexel & Co. has rendered to and on behalf of Electric Bond and Share Company services in connection with the reorganization of Electric Power & Light Corporation and transactions and matters incident to such reorganization.

It requested the Commission to permit Bond and

[8] The Drexel item appears as a payment to Edward Hopkinson, Jr., the senior partner of the firm (R. 118).

Share to pay the $100,000 claimed for such services.

By Findings and Opinion and Order dated April 21, 1952, the Commission approved and directed payment of approximately $590,000 of fees and expenses by Electric, and $250,000 of fees and expenses by Bond and Share (R. 212-270). Bond and Share's application for reimbursement from Electric was denied, the Commission finding that Bond and Share's services in the proceedings (R. 253)

> were not services merely designated to bring Electric into compliance with the Commission's order but were additionally, if not primarily, steps designed to simplify the Bond and Share system and Bond and Share itself at the apex of that system.
>
> * * * Any plan for the compliance of the subholding companies must necessarily have been as a step toward the ultimate resolution of Bond and Share's overall Section 11 problems which were its primary concern.

The Commission further found that $50,000 represented appropriate compensation for the services rendered Bond and Share by Drexel. Its conclusion was based upon a review of the entire record in the proceeding and upon consideration of Hopkinson's standing in the financial community, the extent and nature of the services, and the approximate time spent in so far as it could be reconstructed (R. 262-264). It was also reached

in the light of the general standards set forth in detail in the opinion (R. 223-228).

On June 19, 1952, the Commission filed in the United States District Court for the Southern District of New York, which had reserved appropriate jurisdiction in its order approving and enforcing the dissolution plan (R. 41-47), a Supplemental Application for approval of the payment and denial of fees and expenses as determined by the Commission (R. 270-277).

Drexel, among others, filed objections to the Commission's Supplemental Application (R. 278-282). Bond and Share did not object in court to the Commission's denial of its claim for reimbursement from Electric.

After a hearing on the Supplemental Application and the objections thereto, the court entered its opinion and order overruling the objections and approving the Commission's order (R. 288-292). Drexel and others appealed. The Court of Appeals reversed the order as to the fee of Drexel "for lack of jurisdiction in the Commission," and otherwise affirmed it (R. 312).

The opinion below concedes that the Commission's power and duty to determine whether a Section 11(e) plan is "fair and equitable to the persons affected" gives the Commission jurisdiction to determine what allowances shall be made for fees and expenses (R. 307). It holds, however, that a fee payment by Bond and Share itself does not "affect" its stockholders in such a way as to be

relevant in determining whether Electric's plan is fair and equitable (R. 308). The opinion considers also the provisions of Section 11(f) of the Act, authorizing the Commission to pass upon fees payable "in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof". However, it interprets Section 11(f) as limited to proceedings where a receiver or trustee has been appointed, and holds that the fee to be paid by Bond and Share to Drexel is not a fee paid "in connection with" the proceeding for the dissolution of Electric within the meaning of the quoted phrase as used in Section 11(f) (R. 310). The court does not mention Bond and Share's application for Commission approval of its transactions incident to the plan, the Commission's fee jurisdiction provided in Sections 7, 10, and 12 of the Act, or the relationship of Electric's dissolution to the reorganization of Bond and Share and its holding-company system.

SUMMARY OF ARGUMENT

I

The decision below that the Commission lacks jurisdiction over the Drexel fee is based upon the concept that the fee is "but a business expense of Bond and Share", described as "a solvent corporation whose business affairs are conducted by its own management." (R. 308, 307). Such a concept ignores the regulatory authority of the Com-

mission over Bond and Share because of its status as a registered holding company. As such, substantially all of its major financial transactions, whether or not they involve a reorganization, are subject to Commission approval including approval of fees incurred in connection therewith.

In order to construe properly the extent of the Commission's jurisdiction under Section 11, it must be considered in the context of the Act, and not in isolation from the regulatory powers of the Commission specified in other sections of the Act. *S.E.C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 122. Sections 7, 10, and 12 of the Act (Appendix, *infra*, pp. 39, 40 and 44) require the Commission to pass upon fees and expenses incurred with relation to the transactions regulated under those sections. Bond and Share's application for approval of its own transactions incident to Electric's dissolution was filed herein pursuant to Sections 10 and 12, as well as Section 11. Commission approval of those transactions was necessary, both because they involved one phase of the reorganization of Bond and Share itself, and also because they involved the acquisition of securities, sale of securities, and settlement of intrasystem claims, regulated pursuant to Sections 10 and 12. The specific grant of fee jurisdiction in Sections 10 and 12 is itself a basis for the Commission's exercise of jurisdiction with respect to the Drexel fee. More importantly, with Section 7, the fee provisions of those sections support the general authority of the

Commission to pass upon fees and expenses payable by registered holding companies in connection with all proceedings before the Commission, including Section 11 reorganizations.

II

The primary source of the Commission's jurisdiction over the Drexel fee derives from the fact that the services were rendered in connection with a reorganization under Section 11 of the Act. The Congress was particularly concerned lest investors be exploited by the payment of unreasonable fees during the course of the reorganizations made necessary by the provisions of that Section. Thus, under Section 11(e), it conferred upon the Commission the authority and the duty to determine whether a reorganization plan is "fair and equitable to the persons affected by such plan." The courts, including the court below (R. 308), have agreed with the Commission that supervision over the payment of fees is an integral part of its authority to pass upon the fairness and equitableness of plans. *Standard Gas & Electric Co.* v. *S.E.C.*, 212 F. 2d 407, 410 (C.A. 8), certiorari denied, 348 U.S. 831; *In re Public Service Corp. of N. J.*, 211 F. 2d 231, 232-233 (C.A. 3), certiorari denied, 348 U.S. 820; *In re Electric Bond & Share Co.*, 80 F. Supp. 795 (S.D.N.Y.). This Court held in *American Power & Light Co.* v. *S.E.C.*, 325 U.S. 385, that under certain circumstances a security holder of a parent holding company is, for purposes of

standing to appeal, a "person aggrieved" by an order issued in connection with the reorganization of a subsidiary. By analogy, such a security holder should be held a "person affected" within the provision of Section 11(e) quoted above. Where, as in the present case, the dissolution of the subsidiary was a necessary part of the parent's program to comply with the Act and where the fees charged against the parent are substantial, it is apparent that the amount of such fees is a material element in the fairness and equity of the plan as it affects the security holders of the parent.

Moreover, the last sentence of Section 11(f), which gives the Commission authority to require approval of fees, expenses, and remuneration paid in connection with any reorganization, dissolution, liquidation, bankruptcy or receivership of a registered holding company or a subsidiary thereof, is properly to be construed to apply to the fees incurred by Bond and Share in the present case. In suggesting that that Section applies only to reorganizations in which a receiver has been appointed, the court below differs from the position taken in *Halstead* v. *S.E.C.*, 182 F. 2d 660 (C.A. D.C.), certiorari denied, 340 U.S. 834; *S.E.C.* v. *Cogan*, 201 F. 2d 78, 81 (C.A. 9); and *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 111. The interpretation of the court below also conflicts with the legislative history and the essential purpose of Section 11.

Both the dissolution of Electric and the transactions by Bond and Share which grew out of the

dissolution were a necessary part of the reorganization of Bond and Share and its holding company system. As Bond and Share stated in its application-declaration, "The proposed transactions are steps in compliance by Bond and Share and Electric with Section 11 of the Act * * *" (R. 334). The opinion of this Court in *Leiman* v. *Guttman*, 336 U.S. 1, a Chapter X case, is persuasive authority for the proposition that reorganization fees, although not paid from the assets of the estate, are nevertheless subject to the control of the authority supervising the reorganization.

Throughout the history of the Act, the Commission has supervised the fees to be paid to representatives of parent holding companies by the parents themselves for services rendered in connection with the reorganization of their subsidiaries. Such a consistent administrative interpretation is, of course, entitled to substantial weight.

ARGUMENT

Congress, in the Public Utility Holding Company Act of 1935, has delegated to the Securities and Exchange Commission broad jurisdiction to supervise the payment of fees by registered holding companies. Thus, fees and expenses payable in connection with reorganizations to effect compliance with Section 11 of the Act, as well as fees incurred in connection with the issuance, sale, and acquisition of securities and properties, and intra-system transactions, are made subject to ap-

proval by the Commission. Drexel's servi es were rendered in consolidated proceedings for the dissolution of Electric and related transactions by the parent, Bond and Share, which constituted integral parts of the reorganization of Bond and Share and its holding-company system. The Commission was therefore authorized and required by the statute to determine the reasonableness of the fee which Bond and Share proposed to pay to Drexel.

I. The Commission's jurisdiction over the fees to be paid by Bond and Share is supported by the general statutory authority to control fees and expenses payable by registered holding companies in connection with their financial transactions.

As Bond and Share is a holding company registered under the Act, substantially all of its major financial transactions are subject to regulation by the Commission irrespective of whether such transactions are incidental to a reorganization pursuant to the Act. In addition, Bond and Share, as a registered holding company, is subject to the reorganization jurisdiction which Section 11 of the Act confers upon the Commission. Both the regulatory jurisdiction and the reorganization jurisdiction of the Commission encompass supervision over fees payable by registered holding companies.

The reorganization jurisdiction of the Commission cannot be construed properly from the words of Section 11 alone, read "in comparative isolation from the other provisions of the Act", but rather should be considered "in the context of the

Act, as a whole".[9] Section 11(e) of the Act, under which voluntary plans for the reorganization of registered holding companies and their subsidiaries are submitted to and approved or rejected by the Commission and are then submitted to and approved and enforced or rejected by the district courts, embodies in a single paragraph and in general terms the same broad scope of reorganization powers which Chapter X of the Bankruptcy Act takes many pages to express. To determine the specific powers of the Commission under Section 11, it is therefore appropriate, and indeed necessary, to refer to the more detailed description of the Commission's regulatory powers contained in other sections of the Holding Company Act.

The provisions of the Act governing the Commission's regulatory jurisdiction make plain the broad jurisdiction of the Commission to pass upon fees payable by holding companies in carrying on many of their business affairs. Thus, no registered holding company may issue and sell its securities except "in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective." Holding Company Act, Section 6(a), Appendix, *infra*, p. 39. One of the grounds for the Commission's refusing to permit such a declaration to become effective is a finding, pursuant to Section 7(d)(4) of the Act (Appendix, *infra*, p. 39), that:

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[9] *S.E.C. v. Central-Illinois Securities Corp.*, 338 U.S. 96, 122.

> the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable.

Nor may any registered holding company, however solvent, acquire, directly or indirectly, any securities or utility assets unless "the acquisition has been approved by the Commission under section 10" (Section 9(a), Appendix, *infra*, p. 40). One of the grounds for refusing approval of such an acquisition is a Commission finding, pursuant to Section 10(b)(2) of the Act (Appendix, *infra*, p. 40), that:

> the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable * * *.

Pursuant to Section 12(d) of the Act (Appendix, *infra*, p. 44), no registered holding company may sell any security which it owns of any public-utility company, or any utility assets, in contravention of such rules and regulations or orders regarding "fees and commissions," among other things, as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers.

Finally, pursuant to Section 12(f) of the Act (Appendix, *infra*, p. 44), no registered holding company, however solvent, may negotiate, enter

into, or take any step in the performance of any transaction not otherwise unlawful under the Act, with any company in the same holding company system, in contravention of such rules and regulations or orders regarding "costs," among other things, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers.

In the present case, Bond and Share has made application under Sections 10, 11, and 12 of the Act with respect to the acquisition of securities from Electric, the disposition of its holdings in Electric, and the settlement of intrasystem claims (R. 334). The application states that the proposed transactions will not be carried out except with the approval of the Commission, and makes the statement that fees will be reasonable, along with other assertions concerning issues which must be decided by the Commission, as a reason for believing that the proposed transactions "will be in compliance with" Sections 10, 11, and 12 of the Act (R. 334-335). As noted above, Sections 10 and 12 give the Commission express jurisdiction over such transactions, and over the fees incurred in connection therewith. Therefore, regardless of whether jurisdiction exists by reason of Bond and Share's relationship to the reorganization plan or its own filing under Section 11,[10] the Drexel fees were

[10] Section 11 applies to the transactions proposed by Bond and Share because they "are steps in compliance by Bond and Share and Electric with Section 11 of the Act" (R. 334).

certainly to some extent subject to the Commission's jurisdiction under the other sections.

But it is not necessary to decide whether Sections 10 and 12 alone supply an adequate basis for the Commission's exercise of jurisdiction with respect to the Drexel fee. Rather, with Section 7, they support the general authority of the Commission to pass upon fees and expenses payable by solvent registered holding companies in connection with ordinary financial transactions, and refute the reasons advanced by the court below for holding that Section 11 of the Act, requiring the Commission to pass upon reorganization fees and expenses incurred in the simplification and integration of holding company systems, excludes jurisdiction over fees payable by a registered holding company for services rendered to protect its interests in the reorganization of a subsidiary. They supply some of the statutory context and indications of Congressional purpose from which the more general provisions of Section 11 "derive much meaningful content." *American Power & Light Co.* v. *S. E. C.*, 329 U.S. 90, 104; and see *S. E. C.* v. *Central-Illinois Securities Corp.*, 338 U.S. 96, 122; *Halsted* v. *S. E. C.*, 182 F. 2d 660, 662 (C.A.D.C.), certiorari denied, 340 U.S. 834.

The issuance of securities, the acquisition of utility assets, the disposition of securities, and the intrasystem transactions to which Sections 7, 10, and 12 of the Act apply, are all acts generally performed by solvent companies in connection with their own business, and also by parent companies in connection with the reorganization of their sub-

sidiaries. As the court suggested in *In re Electric Bond & Share Co.*, 80 F. Supp. 795, 798 (S.D. N.Y.), since Congress granted the Commission authority over fees incurred in connection with those financial matters, it is not plausible to assume that less extensive power was granted in a Section 11 reorganization.

II. The Commission's jurisdiction over the fees to be paid by Bond and Share is specifically supported by the provisions, and the legislative history, of Section 11 (e) and (f) of the Holding Company Act.

1. In addition to giving the Commission jurisdiction to supervise fees incurred by registered holding companies in connection with their ordinary transactions, the Congress was particularly concerned lest the reorganizations required by Section 11(b) of the Act be themselves a source of excessive fees. Through the provisions of Section 11(d), (e), and (f) of the Act, Congress granted the Commission full jurisdiction over all fees incurred by regulated companies in connection with Section 11 reorganizations.

The report of the National Power Policy Committee on Public Utility Holding Companies,[11] which summarized the reports referred to in Section 1(b) of the Act and which served as a blueprint for the legislation, refers to the desirability of protecting "the average investor from the exploitation threatening him almost as a matter of course under our usual methods and mores of cor-

[11] Appended to Senate Report No. 621, 74th Cong., 1st Sess., pp. 55-60.

porate reorganization * * * ." [12] The report has been treated by this Court as a significant indication of the objectives of the Holding Company Act. See *Otis & Co.* v. *S. E. C.*, 323 U.S. 624, 636; *North American Co.* v. *S. E. C.*, 327 U.S. 686, 703, 704; *American Power & Light Co.* v. *S. E. C.*, 329 U.S. 90, 101.

Senator Wheeler, sponsor of the legislation in the Senate, emphasized the protective provisions of the proposed legislation: [13]

> That brings me to the last point—the protection of the holding-company investor by the Securities and Exchange Commission. I do not blame the average investor for shuddering at the very word "reorganization." In the usual process of reorganization and regrouping of properties the investor might be given the same milking by reorganizing bankers and their lawyers that he has had to take in railroads, real estate, and every other kind of corporate reorganization. To meet that very danger the bill puts the entire process of reorganization, including fees and so-called "reorganization plans", under the control of the Securities and Exchange Commission.

In reporting the proposed legislation to the Senate, the Senate Committee on Interstate Commerce stated with respect to Section 11: [14]

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[12] *Id.* at p. 58.

[13] 79 Cong. Record 4607, March 28, 1935.

[14] Senate Report No. 621, 74th Cong., 1st Sess., at p. 33. See also the same report at pp. 16-17, 55-60.

> Subsections (d), (e), and (f) outline the procedure whereby the reorganization plans must be approved by the Commission and carried out under the supervision of the Federal courts. * * * Under these subsections, Commission approval of reorganization plans and supervision of the conditions under which such plans are prepared will make it impossible for a group of favored insiders to continue their domination over inarticulate and helpless minorities, or even as is often the case, majorities. *Fees, expenses, and remunerations paid in connection with any such reorganization*, whether under Section 77B of the Bankruptcy Act or otherwise, are made subject to the approval of the Commission. [Emphasis added.] [15]

In *In re Public Service Corp. of New Jersey*, 211 F. 2d 231, 232-233 (C.A. 3), certiorari denied *sub nom. United Corp.* v. *S. E. C.*, 348 U.S. 820, the court said:

> Reorganization fees might be the determining factor in considering whether a plan is fair and equitable to those concerned. The intent of Congress to give the Commission a reasonable supervision over that type of fee is clear from the legislative history of the Act.

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[15] It is no answer to these expressions of purpose that they refer specifically to a draft of the Act that was revised before enactment. There is no indication whatever in the legislative history of Section 11 of any intent to reduce the jurisdiction of the Commission over fees. See footnote 21 *infra*, pp. 31-32.

2. Section 11(e) of the Act gives the Commission the power, and imposes upon it the duty, to determine whether a plan of reorganization submitted to it is "fair and equitable to the persons affected by such plan." According to the analysis of the Court in *In re Electric Bond & Share Co., supra* (80 F. Supp. at 798), jurisdiction over fees "is an inseparable part of the determination of whether a plan is fair and equitable * * * . If the SEC has no power over fees, it may well approve a plan which in the end is not in its judgment fair and equitable, because of the distribution of fees authorized by other jurisdictions." This view "is supported by the very broad powers which are bestowed upon it [the Commission] in the opening words of section 11(e)," providing that plans shall be submitted in "accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers." See also *In re Public Service Corp. of New Jersey, supra; Standard Gas & Electric Co.* v. *S. E. C.*, 212 F. 2d 407, 410 (C.A. 8), certiorari denied, 348 U.S. 831.

The particular issue here is the application of this section to a fee where the "persons affected" are the investors in the parent company and where the funds to pay the fee are not withdrawn from the assets of the company under reorganization, but are contributed directly by the parent company. Decisions of this Court in comparable situations are helpful in the application of the Act in

these particular circumstances. In *American Power & Light Co.* v. *S. E. C.*, 325 U.S. 385, it was held that under Section 24(a) of the Act, which provides generally for review of Commission orders, a stockholder of Bond and Share was a "person aggrieved" by a Commission order approving the refinancing of a debt owed by a subsidiary of Bond and Share to Bond and Share, and that the stockholder thus had the right to seek judicial review of the Commission's order. In this case, the dissolution of Electric was of more direct concern to the stockholders of Bond and Share. The plan itself provided for the acquisition by Bond and Share of new securities with a market value of approximately $65,000,000 at the time the plan was consummated.[16] It also provided for a large cash payment by Bond and Share to Electric in settlement of intrasystem claims. The interests of the Bond and Share stockholders were among the most important of those involved in the proceedings.

Rather than being an "irrelevant factor" in determining the fairness of the plan (R. 308), the fees paid by Bond and Share in connection with the Electric reorganization necessarily diminish *pro tanto* the participation of the Bond and Share stockholders and so affect the fairness and equity of the allocation to them. Thus, Bond and Share's stockholders are "affected" by the fees to be paid

[16] Pursuant to the plan, Bond and Share received 803,329 shares of the common stock of Middle South Utilities, Inc. and 2,870,653 shares of the common stock of United Gas Corporation.

by Bond and Share, just as they and the direct stockholders of Electric are "affected" by the fees to be paid by Electric itself.

In addition, as shown in the Statement, *supra*, the dissolution of Electric was an integral part of the program of Bond and Share itself for compliance with Section 11(b) of the Act. The Commission's order directing the dissolution of Electric and a sister company was based upon the finding that their existence must be discontinued in order to simplify the structure of the holding company system of Bond and Share, and to eliminate the unfair and inequitable distribution of voting power among the security holders of the system. *Electric Bond and Share Company*, 11 S.E.C. 1146, 1214-1215 (1942). In affirming the dissolution order, the First Circuit recognized its relation to Bond and Share's compliance when it stated: "The present litigation is but part of a larger proceeding instituted by the Commission to deal in accordance with the statutory mandates with the whole Electric Bond & Share system and all of its component parts." *American Power & Light Co. v. S. E. C.*, 141 F. 2d 606, 620, affirmed, 329 U.S. 90, 116-117. Bond and Share's application for approval of its own transactions incident to the dissolution of Electric states (R. 334): "The proposed transactions are steps in compliance by Bond and Share and Electric with Section 11 of the Act * * * ."

The significance of the reorganization of its subsidiaries to Bond and Share and its stockholders is

indicated by the fact that, from June 1946 through November 1954, the Commission has passed upon requests by Bond and Share to pay approximately $700,000 to the attorneys and experts whom Bond and Share had retained in connection with reorganizations of its subsidiaries and has approved the payment of approximately $600,000 out of its own assets.[17] During the same period, Bond and Share's requests for approval of like payments to attorneys and experts retained in connection with the phases of its own reorganization which did not directly involve the reorganization of its subsidiaries amounted to approximately $738,000, and the Commission has approved the payment of approximately $686,000 thereof.[18]

Obviously the equity of the Bond and Share security holders is in actuality reduced whether the payment is made by Bond and Share or by its subsidiary. Therefore, the net assets which those

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[17] *United Gas Corporation*, Holding Company Act Releases No. 5677 (March 21, 1945) and No. 6734 (June 21, 1946); *Pennsylvania Power & Light Company*, Holding Company Act Releases No. 6949 (October 17, 1946) and No. 7599 (July 24, 1947), original request shown in transcript pp. 538-539, File No. 54-128-1-5; *National Power & Light Company*, Holding Company Act Release No. 7172 (January 31, 1947); *American Power & Light Company*, Holding Company Act Release No. 11,517 (October 1, 1952) and No. 11,904 (May 11, 1953); *Portland Gas & Coke Company*, Holding Company Act Release No. 11,560 (October 31, 1952); *American & Foreign Power Company*, Holding Company Act Release No. 11,976 (June 5, 1953).

[18] *Electric Bond and Share Company*, Holding Company Act Releases No. 8084 (March 26, 1948), No. 11,903 (May 11, 1953), No. 11,978 (June 5, 1953), No. 12,567 (June 29, 1954) and No. 12,698 (November 5, 1954).

security holders will realize from the reorganization of the subsidiary is quite as truly reduced by fees paid by the parent as by the subsidiary. As far as Bond and Share stockholders are concerned, a reorganization plan for Electric is not fair and equitable if their interest is reduced by unreasonable fees connected with the reorganization even if paid by Bond and Share itself.

3. The power over reorganization fees which is impliedly granted by the "fair and equitable" standard of Section 11(e) is expressly granted by the last sentence of Section 11(f), which gives the Commission authority to require approval of fees, expenses, and remuneration paid in connection with any reorganization, dissolution, liquidation, bankruptcy or receivership of a registered holding company or a subsidiary thereof.

The opinion of the court below suggests that the Commission's jurisdiction over fees conferred by Section 11(f) should be construed as inapplicable to any reorganization proceeding under Section 11(e), unless a trustee or receiver has been appointed therein.[19] That interpretation would contravene *Halsted* v. *S.E.C.*, 182 F. 2d 660 (C.A. D.C.), certiorari denied, 340 U.S. 834, where Section 11(f) was held to be applicable in a Section 11(e) reorganization. See also *S.E.C.* v. *Cogan*, 201 F. 2d 78, 81 (C.A. 9), and *American Power &*

[19] Section 11(e) empowers the enforcement court to appoint a trustee, but that power has never been exercised in any of the proceedings (over 100 in number) for enforcement of Section 11(e) plans.

Light Co. v. *S.E.C.*, 329 U. S. 90, 114, where this Court stated:

> Section 11(f) refers to fees, expenses and remuneration paid in connection with any reorganization, dissolution, liquidation, bankruptcy or receivership of a registered holding company or a subsidiary thereof.

Section 11(f) in its entirety is set forth in the Appendix, p. 45, *infra*. The legislative history and the pattern of regulation under the statute show that the words "in any such proceeding" in the last sentence of Section 11(f) were intended to relate back to the types of proceeding specified in the clause immediately preceding those words, or to all proceedings covered by the first two sentences of Section 11(f) in which a trustee or receiver might be appointed,[20] but were not to be limited to a proceeding in which a trustee or receiver has actually been appointed.[21] An interpretation of

[20] Subsections (d) and (e) of Section 11 of the Act, like Section 77B of the Bankruptcy Act in effect when the Holding Company Act was passed, authorize the enforcement court to appoint a trustee, but do not require such an appointment.

[21] Section 11(f) as originally drafted (§ 11(d) of S. 1725, and § 10(d) of H. R. 5423, introduced February 6, 1935), and as reported to the Senate (§ 11(f) of S. 2796, reported May 14, 1935), started with a provision authorizing the Commission to institute proceedings for the reorganization of regulated companies pursuant to Section 77B of the Bankruptcy Act. The sentence conferring fee jurisdiction then used the phrase "whether under said Section 77B or otherwise" instead of the words "in any such proceeding". Later (June 7, 1935, 79 Cong. Rec. 8844-5) the Senate sponsors of the Bill proposed and the Senate adopted an amendment to the first

Section 11(f) that would permit Commission supervision over fees only in proceedings where a court has appointed a receiver or trustee and is itself in a position to supervise fees and expenses, but would deny the Commission any supervision over such matters where the entire reorganization is conducted before the Commission, would make no statutory sense and would thwart the intent of Congress.

Basically, however, the heart of the opinion below appears to be that the fees are not paid "in connection with" the reorganization as required by Section 11(f) because they are paid not out of the assets of the reorganized company, but by one of its security holders. On that issue the decision of this Court in *Lehman* v. *Gottman*, 336 U. S. 1, is very persuasive. That case decided the question whether, under Chapter X, the bankruptcy court

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two sentences of Section 11(f), eliminating all reference to Section 77B. There was no proposal before the Committee or on the floor of the Senate to restrict the Commission's jurisdiction over fees to be paid in connection with "any reorganization, dissolution, liquidation, bankruptcy, or receivership" of a regulated company. No amendment of Section 11(f) was adopted, except as proposed by the sponsors of the Act. Without any reported discussion in committee or on the floor, the words "whether under said Section 77B or otherwise" were dropped from the fee sentence of Section 11(f) and the words "in any such proceedings" substituted (§ 11(f) of S. 2796, ordered printed June 7, 1935, showing amendments agreed to, for the sole purpose of reflecting the elimination of all prior references to Section 77B. Still later (§ 11(f) of S. 2796 as passed by the Senate June 11, 1935), and again without any discussion or indication of intent to limit fee jurisdiction, the word "proceeding" was substituted for the word "proceedings." (Appendix, *infra*, pp. 45-51)

has exclusive jurisdiction of counsel fees whether paid out of the estate or paid by stockholders directly. This Court upheld the exclusive jurisdiction of the bankruptcy court, stating (336 U. S. 1, 8):

> * * * § 221 (4) is written in pervasive terms—it applies to "all payments" for services "in connection with" the proceeding or "in connection with" the plan and "incident to" the reorganization, whoever pays them. A statute establishing such broad supervision over committees cannot be presumed to be niggardly in its grant of authority when it deals with the matter which of all the others has the most direct impact on those whom it aims to protect. * * * The statute was designed to police the return which all stockholders obtain from reorganization plans. The net return cannot be kept under supervision if private arrangements expressed in escrow agreements are to control. For the impact of excessive fee claims is the same whether they are charged directly against the estate or against the claim which represents a proportionate interest in the estate.

Halsted v. *S.E.C.*, 182 F. 2d 660 (C.A. D.C.), certiorari denied, 340 U. S. 854, construed Section 11(f) as conferring upon the Commission a similarly broad jurisdiction over fees in Section 11(e) proceedings. That case arose from an application

of a committee for stockholders of a registered holding company, filed pursuant to Section 12(e) of the Act, for permission to solicit stockholders for contributions to finance committee operations in a Section 11(e) reorganization. The Commission found its authority to refuse such permission in the fee provisions of Section 11(f), and the court upheld that interpretation. The court found (at p. 666) that the Commission's authority over fees "would be of little worth or significance if a court were to compel the Commission at the present stage of the case to permit the type of activity here contemplated." It also stated (182 F. 2d at 665):

> What is really in issue in this case is not representation; it is fees. * * * The express provisions of Section 11(f), quoted above, give the Commission direct control over the fees to be allowed in enumerated proceedings under the Act. We cannot ignore this provision, or invite its evasion. Under a closely comparable provision of the Chandler Act, the Supreme Court has recently declared that investors are entitled to full protection, even as against their own contractual arrangements. [Citing and quoting from *Leiman* v. *Guttman*, *supra*]

The court below attempted to distinguish the *Halsted* case on the ground that there the committee announced that it intended to seek reimbursement from the assets of the company undergoing reorganization. But, here too, Bond and Share

sought reimbursement from the estate of Electric, and did not recede from that position until after the Commission had passed upon the amount of the fee, had denied the application for reimbursement, and had applied to the district court for enforcement of its decision.

4. The decision below, if upheld, would leave a peculiar gap in the fee jurisdiction of the Commission under the Holding Company Act. Clearly, the Commission has jurisdiction to pass upon the fees payable by a registered holding company in connection with transactions for the issuance and sale of securities, the acquisition of assets, and intrasystem transactions, wholly unconnected with a reorganization. Equally clearly, the Commission has jurisdiction to pass upon the fees payable by such a company in connection with its own reorganization, and in connection with the reorganization of a subsidiary if a trustee or receiver is appointed. The fact that the sales and acquisitions by Bond and Share in this case were connected with the reorganization of Electric, and that this reorganization was effectuated through Commission and court proceedings in which a trustee could have been but was not appointed, offers no proper basis for denying the Commission's jurisdiction over the Bond and Share fees.

5. Throughout its administration of Section 11 of the Act, the Commission has passed upon the fees to be paid to representatives of parent holding companies for services rendered in connection with

the reorganization of their subsidiaries.[22] Until the present case, no challenge has been made to its

[22] See *Public Service Corp. of N. J.*, Holding Company Act Release No. 12,000 (June 16, 1953), affirmed in part, reversed in part, on other issues, *In re Public Service Corp. of N. J.*, 211 F. 2d 231 (C.A. 3), certiorari denied 348 U.S. 820; *Eastern Gas & Fuel Associates*, H.C.A. Release No. 11,954 (May 29, 1953), enforced in part, reversed in part, on other issues, 120 F. Supp. 460 (D. Mass.), appeal pending; *Niagara Hudson Power Corp.*, H.C.A. Release No. 11,667 (January 14, 1953), approved and enforced, 114 F. Supp. 683 (N.D. N.Y.), appeal on other issue pending; *Bauer, Trustee of Pittsburgh Rys. Co. and Philadelphia Co.*, H.C.A. Release No. 11,592 (November 18, 1952); *Interstate Power Co.*, H.C.A. Release No. 11,359 (June 26, 1952); *Northern States Power Co.* (Del.), H.C.A. Release No. 11,145 (April 8, 1952), approved in part and disapproved in part, on other issues, 119 F. Supp. 331 (D. Minn.), affirmed *sub nom. Standard Gas & Electric Co.* v. *S.E.C.*, 212 F. 2d 407 (C.A. 8), certiorari denied, 348 U.S. 831; *The North American Co.*, H.C.A. Releases No. 10,583 (May 28, 1951) and 10,304 (December 21, 1950); *National Power & Light Co.*, H.C.A. Release No. 10,321 (December 28, 1950); *The North American Co.*, H.C.A. Release No. 10,256 (November 30, 1950); *Pennsylvania Edison Co.*, H.C.A. Release No. 9988 (July 21, 1950); *Central States Utilities Corp.*, H.C.A. Release No. 9411 (October 10, 1949); *Market Street Ry. Co.*, H.C.A. Release No. 9376 (September 30, 1949), approved in part and disapproved in part, on other issues, unreported, N.D. Calif., Civil Action No. 29,723, July 11, 1950, affirmed *sub nom. S.E.C.* v. *Cogan*, 201 F. 2d 78 (C.A. 9); *Louisville Gas & Electric Co.* (Del.), H.C.A. Release No. 9346 (September 16, 1949); *The Middle West Corp.*, H.C.A. Release No. 8547 (October 1, 1948); *Central Public Utility Corp.*, H.C.A. Release No. 8468 (August 25, 1948); *Scranton-Spring Brook Water Service Co.*, H.C.A. Release No. 8358 (July 15, 1948); *The United Gas Improvement Co.*, H.C.A. Release No. 8321 (June 29, 1948); *Buffalo, Niagara & Eastern Power Corp.*, H.C.A. Release No. 8024 (March 9, 1948); *Central States Power & Light Corp.*, H.C.A. Release No. 7916 (December 5, 1947); *Midland Utilities Co.*, H.C.A. Release No. 7735 (September 23, 1947); *The Laclede Gas Light Co.*, H.C.A. Releases No. 6954 (October 21, 1946) and No. 6306

jurisdiction over these allowances.[23] Such a consistent interpretation of the statute by the agency designated by Congress to administer it is entitled to substantial weight. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Ass'ns, Inc.*, 310 U. S. 534, 549; *North American Utility Securities Corp.* v. *Posen*, 176 F. 2d 194, 197 (C.A. 2).

CONCLUSION

The regulatory pattern and legislative history of the Holding Company Act make it clear that the Commission had full jurisdiction to pass upon the reasonableness of the Drexel fee, because of its connection with the dissolution of Electric and the reorganization of the Bond and Share holding company system, and with the specific transactions by Bond and Share which required Commission approval. The court below erred in its disregard of the direct participation by Bond and Share in the transactions required for Electric's dissolution, and

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(October 17, 1945); *The United Corp.*, H.C.A Release No. 6509 (March 22, 1946); *Columbia Gas & Electric Corp.*, 17 S.E.C. 549 (1944), approved and enforced, unreported, D. Del., Civil Action No. 288, May 18, 1945; *Cities Service Co.*, 15 S.E.C. 536 (1944); *Puget Sound Power & Light Co.*, H.C.A. Release No. 4835 (January 13, 1944); and *Derby Gas & Electric Corp.*, H.C.A. Release No. 3236 (December 30, 1941).

[23] Unless Drexel itself had originally believed that the Commission had jurisdiction over the fee payable to it by Bond and Share it would not have agreed with Bond and Share that the amount of the fee should be such as might be approved by the Commission, nor would it have applied to the Commission for approval of the payment by Bond and Share.

in its piecemeal interpretation of Section 11(e) and (f) without regard to their statutory context.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

SIMON E. SOBELOFF,
Solicitor General.

WILLIAM H. TIMBERS,
General Counsel,
MYRON S. ISAACS,
Associate General Counsel,
ELIZABETH B. A. ROGERS,
Attorney,
Securities and Exchange Commission.

DECEMBER, 1954.

APPENDIX

The following provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U.S.C. 79a *et seq.*) are pertinent:

SEC. 6(a) Except in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

* * * * *

SEC. 7 * * *

(d) If the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

* * * * *

(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale,

or distribution of the security are not reasonable;

* * * * *

SEC. 9(a) Unless the acquisition has been approved by the Commission under section 10, it shall be unlawful—

(1) for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to acquire, directly or indirectly, any securities or utility assets or any other interest in any business.

* * * * *

SEC. 10 * * *

(b) If the requirements of subsection (f) are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

* * * * *

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired

or the utility assets underlying the securities to be acquired: * * *

* * * * *

SEC. 11 * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commisison, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice

and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding

under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

* * * * *

SEC. 12 * * *

(d) It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to sell any security which it owns of any public-utility company, or any utility assets, in contravention of such rules and regulations or orders regarding the consideration to be received for such sale, maintenance of competitive conditions, fees and commissions, accounts, disclosure of interest, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of the title or the rules, regulations, or orders thereunder.

* * * * *

(f) It shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to negotiate, enter into, or take any step in the performance of any transaction not otherwise unlawful under this title, with any company in the same holding-company system or with any affiliate of a company in such holding-company system in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of com-

petitive conditions, disclosure of interest, duration of contracts, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules and regulations thereunder.

LEGISLATIVE DRAFTS OF SECTION 11 (F) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

(a) Section 11 (d) of S. 1725 and Section 10 (d) of H.R. 5423, identical bills except for the short title and the number of sections, introduced in the Senate and House, respectively, on February 6, 1935:

"If, in the judgment of the Commission, any registered holding company or any subsidiary company thereof is insolvent or unable to pay its debts as they mature, the Commission shall have power to institute proceedings for the reorganization of such company under section 77B of the Act of July 1, 1898, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', as amended. In any such proceedings or in any other proceedings in a court of the United States, whether under said section 77B or otherwise by whomsoever instituted, for the reorganization or liquidation of any registered holding company or subsidiary company thereof or in which a receiver or trustee of

any such company or any assets thereof is appointed, the court, at the request of the Commission, shall have jurisdiction, and it shall be the duty of the court, to constitute and appoint the Commission as sole trustee or receiver, whether or not a trustee or receiver shall theretofore have been appointed. In any such proceedings a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be prepared in the first instance by the Commission or, subject to such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. All fees, expenses, and remuneration paid in connection with any reorganization or liquidation of a registered holding company or subsidiary company thereof, whether under said section 77B or otherwise, shall be subject to the approval of the Commission. The Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceedings as the court may allow."

(b) Section 11 (f) of S. 2796, as reported out with Senate Report No. 621, May 7 (calendar day, May 9), 1935:

"If, in the judgment of the Commission, any registered holding company or any subsidiary company thereof is insolvent or unable to pay its debts as they mature, the Commission shall have power to institute proceedings for the reorganization of such company under section 77B of the Act of July 1, 1898, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' as amended. In any proceeding pursuant to this section or in any other proceeding in a court of the United States, whether under said section 77B or otherwise, by whomsoever instituted, for the reorganization, dissolution, liquidation, bankruptcy, or receivership of any registered holding company or subsidiary company thereof or in which a receiver or trustee of any such company or any assets thereof is appointed, the court shall have jurisdiction to appoint a trustee or receiver, and, at the request of the Commission, shall have power, and it shall be the duty of the court to constitute and appoint the Commission as sole trustee or receiver, whether or not a trustee or receiver shall theretofore have been appointed. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become ef-

fective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, whether under said section 77B or otherwise, shall be subject to approval by the Commission. The Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceeding as the court may allow."

(c) Section 11 (f) of S. 2796, Senate Report 621, May 13 (calendar day, June 7), 1935:

~~"(f) If, in the judgment of the Commission any registered holding company or any subsidiary~~

~~company thereof is insolvent or unable to pay its debts as they mature, the Commission shall have power to institute proceedings for the reorganization of such company under section 77B of the Act of July 1, 1898, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', as amended. In any proceeding pursuant to this section or in any other proceeding in a court of the United States, whether under said section 77B or otherwise, by whomsoever instituted, for the reorganization, dissolution, liquidation, bankruptcy, or receivership of any registered holding company or subsidiary company thereof or in which a receiver or trustee of any such company or any assets thereof is appointed, the court shall have jurisdiction to appoint a trustee or receiver, and, at the request of the Commission, shall have power, and it shall be the duty of the court to constitute and appoint the Commission as sole trustee or receiver.~~

"(f) *In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court shall have power, and, at the request of the Commission, it shall be the duty of the court, to constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court*, whether or not a trustee or receiver shall theretofore have been

appointed. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commsision) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, ~~whether under said section 77B or otherwise~~ *in any such proceedings*,[1] shall be subject to approval by the Commission. The Commission shall be entitled to such reasonable compensation for its

[1] In the version of the Bill as passed by the Senate on June 11, 1935, the word "proceeding" appears instead of "proceedings."

services as trustee or receiver in any proceeding as the court may allow."[2]

[2] On June 10, 1935, an amendment, which was proposed by Senator McKellar, to strike the last sentence of Section 11 (f) of S. 2796 was agreed to without an objection on the Senate floor.